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IN THE

Supreme Court of the United States

No. ~~1750~~ 70-207

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Respondent,

vs.

JEFFERY SCOTT LEVY,
Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN AND THE COURT OF APPEALS FOR THE STATE OF MICHIGAN

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Jeffery Scott Levy, hereby petitions this Honorable Court for a Writ of Certiorari to review a judgment and opinion of the Court of Appeals of the State of Michigan rendered in this Cause on December 2, 1970, and from the denial of Application for leave to appeal entered by the Supreme Court for the State of Michigan on January 22, 1971 (Rehearing denied, February 26, 1971), and respectfully shows:

(a) OPINIONS IN THE COURT BELOW

1. The order for Execution of Sentence of the Circuit Court for the County of Oakland, State of Michigan: *People of the State of Michigan vs. Jeffery Scott Levy* (February 8, 1971). Copy of said Order attached as Appendix A.

2. The opinion of this Court of Appeals for the State of Michigan: *People of the State of Michigan vs. Jeffery Scott Levy* (December, 1970) 28 Mich. App. 339. A copy of the Opinion attached as Appendix B.

3. The opinion of the Supreme Court for the State of Michigan; *The People of the State of Michigan v. Jeffery Scott Levy* (February 26, 1971), 384 Mich. 801, (Rehearing denied, February 26, 1971. A copy of the Opinion attached as Appendix C.

(b) JURISDICTION OF THIS COURT

The judgment sought to be reviewed was dated and entered on December 2, 1970, by the Court of Appeals for the State of Michigan. Application by Petitioner for leave to appeal was denied by the Supreme Court for the State of Michigan on February 26, 1971. The statute conferring on this court jurisdiction to review such judgment by writ of certiorari is 28 U.S.C. 1257 (3).

(c) QUESTIONS PRESENTED FOR REVIEW

1. Does the Judgment of the Court of Appeals for the State of Michigan, which affirms the verdict of the Oakland County Circuit Court deprive the Petitioner of his right to liberty without due process of law?

(d) CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Federal Constitutional provision involved is the Fourteenth Amendment, Section 1 (due process and Equal Protection). The Michigan Statutes involved are Michigan Compiled Laws, Annotated, Section 767.51; Michigan Compiled Laws, Annotated, Section 750.136; Michigan Compiled Laws, Annotated, Section 769.26. The Michigan Constitutional provision involved is Article I, Section 17, (Due Process of Law), and Article I, Section 2, (Equal Protection). The verbatim text of these sections of the State Statutes and the State Constitution is attached as Appendix D.

CONCISE STATEMENT OF THIS CASE

On June 24, 1969, the information filed in the case of the People of the State of Michigan v. Jeffery Levy, stated that:

> "Jeffery Levy late of the City of Troy in said County heretofore, to-wit: on or about the 13th day of May, 1969, at the said City of Troy in said County, was then and there a person under whose protection a child, towit: Charles B. Moseley, III,

> was and did cruelly or unlawfully punish said child contrary to Sec. 750.136 of the Compiled Laws of 1948: M.S.A. § 28.331 (maximum penalty—4 years), contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Michigan."

After Defendant's counsel brought to the attention of the Court that the information did not properly indicate the time of the alleged crime, the prosecutor's office filed and served upon Defendant's counsel a "First Amended Information" providing the additional language of:

> "On or about the 13th day of May *to the 16th day of May, 1969*"

said "First Amended Information" having been filed on September 8, 1969:

At the time of the trial, the assistant prosecutor stated to the jury:

> "The general Information reads as follows:
>
> > 'In the name of the People of the State of Michigan, . . . that Jeffrey Levy, late of the City of Troy in said County, heretofore to wit: On or about the 13th day of May to the 16th day of May, A.D., 1969, at the said City of Troy in said County, was then and there a person under whose protection a child, to wit: Charles B. Moseley, the Third, was and did cruelly or unlawfully punish said child contrary to the laws of the State of Michigan,' and the numbers of which are meaningless to you at this time.
>
> Now that's the specific charge that the Defendant stands accused of."

The prosecutor went on to say that the charge carries or includes several elements that must be proven, each and

every one of them beyond a reasonable doubt by the People, and cited two elements.

> "That the Defendant cruelly or unlawfully punished Charles B. Moseley, the Third, on or about May 13 through 16, 1969."
>
> "Now the second basic element in a child cruelty case is that at the time that this child was punished by the Defendant, the People must prove beyond a reasonable doubt that the child was under the Defendant's protection, . . ."

Thereafter Defendant's counsel indicated his theory of the case to the jury. In the absence of the jury, before proofs were taken, Defendant's Counsel moved the Court to exclude the photographs which the prosecution had in its possession, citing the case of *People v. Turner,* 17 Mich. App. 123, and indicating to the Court:

> "I think this case, if the Court please, specifically covers the inadmissibility of these particular photographs. These photographs will have an emotional effect upon the jury itself and in this particular case, your Honor, so as to avoid the necessity for the photographs whatsoever, Defense will stipulate that there was in fact abrasions and contusions to the body of the boy, Moseley, in this case. I think, based upon Defense's stipulation, and based upon the prejudicial effect that these photographs would have, even in the absence of a stipulation, the defense at this time would move their exclusion."

The Court then ruled that the photographs would not be deemed prejudicial to the respondent, that the photographs were black and white pictures of an unusual nature, and held them material to the People's case. The prosecutor then called his first witness, the mother of the child, one

Betty Moseley. Betty Moseley was represented by counsel, Lynn Hooe, Esq., and (in the absence of the jury), indicated to the Court:

> "I would like to have the Court's permission to continue to advise her of her Constitutional rights and particularly of her Constitutional rights not to testify to matters that tend to incriminate her."

The Court then ordered and granted immunity to Betty Moseley, again in the absence of the jury, and ordered Betty Moseley:

> "I would remind the witness, while she is here on the Stand and under oath but not in the presence of the Jury, that material questions put to her by Mr. Leib must be answered, and if she refuses to answer, she will be in contempt of this Court . . ."

When the jury was returned to the courtroom, Mr. Hooe was introduced as Mrs. Moseley's attorney and mention was made of a "signed Order granting her immunity", but no explanation was further made. Betty Moseley then proceeded to indicate that she was the fiance of the Defendant; that she met him in a bar where she was a topless go-go dancer; that at the time Charles Brooks Moseley, III, her three year old child was in a boarding home; that she did not remember the address or the names of the people with whom he was residing; that she visited him two to three times a week; that on March 2, 1969, she lived with the Defendant at 1655 Beechlane in Troy; that on March 3, 1969, her son, Charles Moseley, III, came to live with her; and that on March 16, 1969, she was employed at Trainor's Tavern and she did not remember how long she had been working there; and in answer to the prosecution's question:

"Was it more than a week?"

she answered,

"I really couldn't say, I don't know."

The prosecutor then went on and attempted to establish that Jeff Levy had been with Charles Brook Moseley, III, for some period prior to the 16th, but failed to do so.

"Q. During the time that you worked at Trainor's Tavern on Woodward Avenue, who stayed with Charles Brook Moseley, III?

A. Jeff Levy.

Q. He stayed with Charles Brook Moseley each and every night you worked at Trainor's? Is that correct?

A. Sometimes the girl upstairs would come down.

Q. But on most occasions, would it be the Defendant?

A. Yes."

This was the only testimony of care, custody and control that the prosecution elicited from any witness for any period prior to May 16, 1969. Betty Moseley then proceeded to testify that her upstairs neighbor called her when she was at Trainor's Tavern and she went straight to the hospital. On cross-examination, Betty Moseley testified that she had indicated prior to the trial, to the prosecutor, that her:

"baby told me that car hit him the day he came home from the hospital."

and that she had further told the prosecutor that a short time prior to the hospitalization that her son was injured by falling out of bed. She further testified that he bruises easily and that after the fall out of bed onto the hardwood

floor and next to the hardwood chest of drawers, he had bruises on his back and bruises on his head; and that the night before that he fell out of bed and despite the fact that she walked in and put him back in bed, he kept falling out of bed and hurt himself.

The prosecution then called Officer Thomas Donovan, who indicated that on May 16, 1969, at Defendant's request, he summoned an ambulance to take the child to Beaumont Hospital; that he did not go to the hospital at that time, nor did she see the child in the hospital. The prosecutor then showed People's Exhibits Numbers 2; 3, and 4 to Police Officer John Thomas Donovan for the ostensible purpose of ascertaining the identity of Charles Brook Moseley, III, the court permitting such display of the photographs over Defendant's counsel's objection. Upon cross-examination, Officer Donovan admitted that some of the minor scratches he told about on direct examination were partially healed and that he knew the difference between a fresh cut or scratch and a partially healed one, and that the bruises around the neck were of a dark color grayish black, which indicated to him that they had been there awhile.

On re-direct by the prosecuting attorney, Officer Donovan testified that:

> "He (the Defendant) told me that on the 13th of the month, which was a Tuesday, after the boy's mother had left for work, that the boy was in bed and that Mr. Levy stepped out the back door to do some work on his automobile, that he returned approximately 15 minutes later, and he observed that the bedroom door of the boy's bedroom was open. Upon checking the room, found that the boy was gone. He further told me that he went out to the street after the boy, caught up to the boy just in time to pull him from in front of a passing car, and he threw the boy across the road to keep the

> boy from getting hit by the car, and that he subsequently was hit by the car himself."

Officer Donovan further testified on re-direct examination:

> "He (the Defendant) told me on the 12th the child had fallen out of bed, and that at that time the child's mother was at work and that he called the mother and asked her to come home."

Further cross-examination elicited Officer Donovan's testimony that Beech was a gravel road which has ditches on either side of it.

The prosecution then introduced Dr. Robert F. Cooper who testified that on May 16, 1969, he saw a child by the name of Charles Brook Moseley, III, in the Pediatrics Ward of William Beaumont Hospital, and that the child was covered with bruises. Prosecution then held up before the jury and showed that witness People's Exhibits 1, 2, 3 and 4; and elicited the doctor's testimony that the bruises look relatively fresh. The prosecution then elicited an opinion and answer to a hypothetical question which was objected to by defense counsel in that the question did not purport to cover all of the facts and evidence concerning the alleged occurrence, but presumed to take only certain portions of it and therefore was not complete. The court, over objection of Defendant's counsel, permitted the doctor to state:

> "The pattern of bruises—that wouldn't produce this pattern of bruising, an over-all body rubbing. I should think it would have produced more abrasions or open wounds than I see on him."

Cross- examination indicated that some of the injury the doctor described, including a sclera hemorrhage, is often

caused by other than a direct blow. The doctor further testified in answer to the question:

> "Q. . . . Isn't it a fact, Doctor, that back in June of 1969, specifically June 16, you said that if this little boy told you he was hit by a car, that you would believe him?
> A. I must have."

The doctor finally admitted at the close of the cross-examination that his experience outside his field with traumatic injuries caused by accidents was indeed limited.

People then called Detective Corporal Robert Robertson to the stand, who proceeded over the defense counsel's objection to tell what items were found in the child's bedroom and elsewhere throughout the house of Betty Moseley. People's Exhibits 1, 2, 3 and 4 were again displayed and introduced through this witness ostensibly with regard to another identification of the child.

The prosecution then introduced a doctor, Iraj Rafani, a gynecologist and obstetrician who was working in the emergency room on May 16, 1969. Once again, through this witness the prosecution displayed the gruesome photographs; Exhibits 1, 2, 3 and 4, ostensibly for identification purposes. This doctor testified that he saw multiple bruises all over the child's body; that the child looked a little weak but was quite conscious and alert.

Contradicting the earlier witness, this dostor testified:

> "Well, the bruises to me didn't look to be all of them had been the same time. Some of them were a little fresh because you can tell by the color of the bruise. Some of them a little older, but I didn't think they were more than three or four days old."

On cross-examination, Dr. Rafani stated he would not consider himself a specialist in traumatic injuries.

It is important to note that neither of the prosecution's medical witnesses brought their records nor the hospital records to court with them so that Defendant's counsel could cross-examine them as to their recollections and opinions.

People then rested their case and Defendant's counsel made a motion for a directed verdict of Not Guilty, citing *People v. Loomis,* 161 Mich. 651 and *People v. Marks,* 255 Mich. 271; indicating that the Defendant was charged with an offense that was not deemed continuous; that there had been no proof of distinct whippings; no proof on a particular date; that the People had failed to elect as between the dates charged; all of which constituted prejudice to the Defendant.

Defense counsel further moved for a directed verdict of Not Guilty in that construing the proofs most favorably to the People at that point, would only permit the jury to speculate on who had custody and control of the child. The court denied Defendant's motions.

Thereafter Defendant produced Dr. Max Karl Newman as an expert witness for and on behalf of the respondent. Dr. Newman testified as to the extensivesess of his background and training. Dr. Newman testified that if the mother of the child had testified in court that her child bruises easily, just like herself, this would be a significant factor to him; and that if prior doctors relied upon a pattern of bruises they would be relying upon something that was unreliable.

Dr. Newman, after reviewing prosecution's Exhibits 1, 2, 3 and 4, based upon his experience and expertise stated:

> "It would take that type of a traumatic incident of being thrown, rolling, being contacted with whatever the type of pavement was, in this instance you said gravel, would be more apt to occur on a gravel type of pavement or skimming along hard pavement, to assume these many ecomodic areas."

Thereafter, Defendant rested his case without taking the witness stand. After summations of the prosecution and defense, the Court instructed the jury, giving the theory of the People at length, without giving the theory of the Defendant, stating only:

> "On the other hand, the Respondent says that he is not guilty, and that the People have failed in their responsibility to prove his guilt beyond a reasonable doubt."

Defendant's counsel voiced immediate objejction at the close of the Court's instruction to the absence of Defendant's theory of the case. Defense counsel objected to the Court's failure to read the entire relevant portion of the statute so as to convey to the jury the full legislative intent. Lastly the Defendant's counsel objected to the Court's failure to instruct the jury to disregard the prosecutor's prejudicial comments concerning Defendant's failure to take the Stand.

Thereafter, the court ... ing ...ected not to act upon Defense Counsel's objections, the jury returned a verdict of guilty as charged.

ARGUMENT

I.

In his Brief on Appeal, Defendant-Appellant raised as his first Averment of Error, the following issue:

> **IS DEFENDANT-APPELLANT INFORMED AND ARE HIS RIGHTS PROTECTED WHEN THE CHARGE BY THE PEOPLE FAILS TO SUFFICIENTLY INDICATE THE TIME OF THE ALLEGED CRIME?**

In support of his averment that the decision by the Trial Court was adverse to the Defendant on this particular issue, the following argument was set forth in Appellant's Brief:

It is the substantial right of every defendant to be informed by the Information, with a fair degree of certainty, the particular charge made against him with proper averments of time, place and person or circumstances. The Defendant cannot, without such averments, know what he is to meet. *People v. Minnock,* 52 Mich. 628; M. S. A. § 28.991, C. L. '48, §767.51.

The general Information charging Jeffery Levy with the offense of cruelty to children states with pertinence that:

> "On or about the 13th day of May to the 16th day of May, A.D. 1969, at the said City of Troy in said County, was then and there a person under whose protection a child, to wit: Charles B. Moseley, the Third, was and did cruelly or unlawfully punish said child contrary to the laws of the State of Michigan."

The information did not allege the particular time of the offense, nor were there any proofs offered during the

course of the trial indicating the specific beating on a specific date.

The offense which the Defendant is charged with, M.C.L.A. §750.136, entitled, Cruelty to Children, is not continuous in its nature. In an appeal from a conviction under the predecessor to the present statute, the court in *People v. Loomis, supra,* at 656, said:

> "The particular provision under consideration does not specify an offense continuous in its nature like other provisions of the section, and while repeated punishments at short intervals for unimportant offenses, taken together, might constitute cruel punishment should at least be specified in apt terms in the Information."

In the case of *People v. Marks,* 255 Mich. 271, at 274, the court discussed the diverse offenses under the statute in question in the instant case. The court concluded that the first offense, cruelly punishing a child, was a separate and distinct offense.

> "First, torturing and cruelly punishing, must be alleged and proven as of a certain date; the other two are continuous in their nature and consist of various acts covering a period of time." (The latter two offenses dealt with neglect.)

The court took cognizance of the fact that some offenses are continuous in nature and therefore may be averred to and proven as such, but it did specifically note that the offense of torturing and cruelly punishing (the precedessor to "Cruelly or unlawfully punishes", a separate provision relating to torture of children) was made by M.C.L.A. §750.136 [a] and must be alleged and proven as of the specific date.

Both of the cases cited (i.e. *People v. Loomis* and *People v. Marks*) were reversed because of a failure to *require* the prosecution to state with particularity the specific date of the offense.

In this particular case before this court, the prosecution must establish custody under the statute. It was incumbent upon the prosecution to establish that the minor, Charles Moseley, III, was under the care, custody and control of the Defendant at the time of the offense. *The only testimony offered was that the child could have been with one of three people; the mother, "the girl upstairs", or the Defendant.* By not having the proper information as to the particular time of the offense with which he was charged, the Defendant was unable to negate any implication of custody. Whereas in some instances the Information may be general in nature, in this particular case the Defendant was severely prejudiced because the Information not only failed to cite any particulars constituting the crime, but the actual date of the offense as well.

The Court of Appeals, in its opinion on page 2, attempted to distinguish the precedent cited by Defendant-Appellant in his Brief. The Court of Appeals alleged that *People v. Loomis* charged a continuous offense extending over five and one half months, while the information in *People v. Marks* charged three offenses in one count, two of which were of a continuous nature. Defendant-Appellants aver that these cases are inapposite, but that they set forth the law in the State of Michigan as the Supreme Court of the State of Michigan sees it: that an indictment or information must state the date of the offense as near as is possible, the reason for same being to apprise Defendant sufficiently of his alleged crimes so that he may prepare a proper defense.

Appellant contends that not only are his cited cases, *Loomis* and *Marks,* not inapposite, but, practically stand on all fours with the present situation. Both of the cases cited were reversed by the Michigan Supreme Court, because of the prosecution's failure to sufficiently state the specific date of the offense.

Furthermore, the Court of Appeals indicated that if Defendant were dissatisfied with the time averment in the amended information, he should have sought relief in the Trial Court by Motion. This the Defendant did do, and the amended information is what he was tried upon. It is obvious that the Trial Court was in error in allowing the amended information, which was even less specific than the original information, to stand in light of the Defendant's motion. It is also obvious, at least to your Appellant, that the Court of Appeals failed to sufficiently address itself to this issue, and failed to recognize the error in the Trial Court's decision on same.

II.

In the Court of Appeals, Defendant-Appellant raised the following issue, in addition to the previously cited Issue:

DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR BY RULING ADMISSIBLE GRUESOME PHOTOGRAPHS DESPITE DEFENSES' STIPULATION TO ALL FACTS TO BE DEMONSTRATED BY THE PHOTOGRAPHS?

In support of this averment of error on the part of the Trial Court, Defendant-Appellant put forth the following argument in his Brief:

The Photographs in question (i.e. People's Exhibits 1, 2, 3 and 4) were highly inflammatory in nature. They de-

picted the child shortly after he entered the hospital, showing his nude body covered with bruises and contusions, including his genital area. Defense counsel objected to the admission of these photographs on the grounds that their prejudicial effect outweighs their probative value. The prosecution offered the photographs to show what was actually observed at the time by a doctor. Defense counsel, however, had agreed to stipulate to the fact that these contusions and abrasions did exist. Therefore, since the existence of the injuries was undisputed, the only material point in issue was the cause of said injuries. This latter matter was the subject of testimony by expert witnesses. The photographs were of little or no probative value in the eyes of the jury, other than to arouse emotion and passion to the great prejudice of the Defendant.

The Test for the admission of photographs was clearly stated by the Michigan Court of Appeals in *People v. Brannon,* 14 Mich. App. 690, wherein the court said:

> "The admission of photographs may be objected to because they are: 1) not material to any point in issue, see *People v. Becker, supra;* 2) because they do not adequately represent the person, place or thing photographed, see *People v. Herrell* (1965), 1 Mich. App. 666; or 3) because they are calculated to inflame the minds of the jurors, see *People v. Burns* (1952), 109 Cal App 2d 524 (241 P2d 308)."

More recently this court reiterated the above test in *People v. Turner,* 17 Mich. App. 123 at page 131 quoted from an earlier case in establishing their position on highly inflammatory photographs:

> "A trial court, to avoid even the risk of unfairness, should demand that a photograph be admitted only after the People establish other than no alternative methods of proof are available or that an

> issue is so highly controverted as to be incapable of proof through alternative means. In the present case, (the material points in issue) were capable of proof through other methods which should have first been exhausted before admission of the photographs were considered. Having failed to require exhaustion of alternative proof prior to submitting the photographs, the trial court abused its discretion."

Photographs that are merely calculated to arouse the sympathies of prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions. 29 Am. Jur. 2nd, Evidence, § 787. It is difficult to condone the admission of these photographs into evidence. There was no disputed question as to the extent and type of injuries, nor could the photographs be construed as helpful to laymen illuminating the origin of the child's injuries.

Moreover, evidence of the fact that the prosecution was offering these photographs merely to arouse the emotions of the jury to the prejudice of the Defendant may be gathered from page 259 of the transcript where, prior to going into his rebuttal, the prosecuting attorney stated as follows:

> "Ladies and gentlemen, before I even go into my rebuttal, let me remind you that these exhibits are here. You can ask the Court. You must ask the Court for permission to take them into the jury room if you want to take another look at them. They don't go in automatically. Under the rules of our system, if you want to see those pictures, you have to ask for them. Nobody just gives them to you, so keep that in your mind. *During the course of your deliberations, if you want to take a look again at these very sad pictures, then you have to ask for them.*" (Emphasis added.)

The Michigan Court of Appeals, in the case of *People v. Brannon,* 14 Mich. App. 690, at 693, quoted the Illinois Supreme Court on a similar matter:

> "Mindful of the prejudicial emotion that might be aroused by the introduction of a victim's photograph, the courts have, on the whole, a strict requirement that a very proper purpose be shown for the introduction of such an exhibit." *People v. Jackson* (1956), 9 Ill. 2d 484 (138 N.E. 2d 528, 531)

When a trial deals with a matter as emotionally laden as a child abuse case, the court must exert extra care to avoid highly prejudicial evidence. The Defendant entered the court surrounded by highly inflammable publicity. Both the written and televised media had been featuring public outcries against child abuse. While we think this motive is highly commendable, the Defendant was entitled to the very greatest of protection from its inflammatory nature. A photograph may be admitted if its value as evidence outweighs its prejudicial effect. It may be excluded, however, if its prejudicial effect may well outweigh the probative value. *People v. Jenkin,* 10 Mich. App. 257, 29 Am. Jur. 2nd Evidence §787. The Defendant-Appellant fervently submits that the latter rule is applicable to the case at bar.

The Court of Appeals, on page 3 of their opinion, discussed this issue in one short paragraph. Their conclusion was that the admission of the photographs was not error, and they cite *People v. Freeman* (1965), 1 Mich. App. 63. Defendant-Appellant contends in this appeal that *People v. Freeman,* a decision arising from the Court of Appeals, does not stand in support of the decision rendered in this case. Furthermore, Defendant-Appellant contends that the Court of Appeals completely failed to address itself to the real issue involved in this particular averment. *i.e.* that the defense offered to stipulate to all of the facts which

were to be demonstrated by the photographs, thus negating their probative value completely. It was, and is, Defedant's contention, at the Court of Appeals, the Michigan Supreme Court, and in this Application for Writ of Certiorari, that the photographs involved herein, were shown to the jury for no purpose but to inflame the jury and to completely cloud the issue of the People's burden of proof of this crime. The admission of these photographs into evidence, and their submission to the jury for their view, in the light of Defendant's offer of stipulation, severely prejudiced the Defendant's case and it was error for the Court of Appeals to find that the admission of these photographs by the Trial Court was proper.

III.

In his Appeal to the Court of Appeals, Defendant-Appellant submitted for decision the following issue:

> **IS IT ERROR TO PERMIT THE PROSECUTION IN HIS ARGUMENT TO THE JURY TO COMMENT ON THE FACT THAT THE DEFENDANT, JEFFERY LEVY, FAILED TO TAKE THE STAND AND TESTIFY IN HIS OWN BEHALF?**

In support of this averment, Defendant-Appellant, in his Brief, set forth the following arguments:

At the middle of page 260 of the trial transcript, the prosecutor, in his statements to the jury, commented indirectly at some length on the fact that the Defendant, Jeffery Levy, did not testify during the course of the trial. He stated as follows:

> "Where have any of these claims been testified to by direct testimony? Has Mr. Gage substantiated one claim of his opening statement? Did he show

> you, by direct testimony, not what somebody else said to so and so, and did he show by direct testimony that there was an accident? Did he show that the police officers were over zealous? Did he show that the police officers suggested to the doctors in the hospital that 'here's a battered child case'? Did he show that by any testimony at all? He told you he would, but has he shown you by direct testimony from the witness stand?"

The above statements by the prosecutor clearly constituted comment in front of the jury upon the fact that the Defendant, Jeffery Levy, had failed to testify during the course of the trial.

The Fifth Amendment to the United States Constitution was adopted verbatim by Article 1, §17 of the Michigan Constitution of 1963 with regard to the right against being compelled in a criminal case to be a witness against oneself. Furthermore, M.C.L.A. §600.2159 and M. S. A. §27A.2159 state:

> ". . . A defendant in any criminal case or proceeding shall only at his own request be a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comments to be made to or upon such neglect. (C.L. '48 §600.2159)"

As early as *People v. Paine,* 131 Mich. 474, the Michigan Supreme Court found error in comments made by the prosecutor regarding the fact that the Defendant had failed to testify. As in the present situation the court stated:

> "We think there is much force in the claimant's counsel that the only possible result of this kind of remarks was to direct the attention of the jury particularly to the fact that respondent had not testified at all in contradiction of the girl. It could mean and did mean nothing else."

The above case involved a prosecution for seduction.

In *People v. Wessel,* 256 Mich. 272, in a prosecution for negligent homicide, the court held that it was improper for the prosecutor to call attention to Defendant's failure to take the witness stand. The court said:

> "The Constitutional provision (Constitution, Article 2, §16) that one cannot be compelled in a criminal case to be a witness against himself is rendered of little or no force if, by adverse criticism or argument, the exercise of the right is treated as a circumstance against him. The only practical way to avoid the burden of such criticism and argument, if permitted, is for defendant to take the stand and not be deprived of his constitutional rights."

This case was reversed despite the fact that the court had instructed the jury at the time of the comments to disregard the remarks, holding the error was not cured by said instructions.

Furthermore, as required by the case law, timely objection was made to the aforementioned prejudicial remarks as shown at page 275 of the trial transcript, by the following objection.

> "Lastly, if the court please, the prosecutor, as the defendant, viewed his rebuttal argument, attempted to do indirectly what he did not do directly, and that is, comment unfavorably because the Defendant did not take the stand. Nowhere in your Honor's charge did I note an instruction to the jury telling them to disregard these comments and I think those comments were prejudicial."

From the preceding discussion of the facts and the law as applied to the facts in this particular decision, it is clear that the Defendant, Jeffery Levy, was greatly preju-

diced by the remarks of the prosecutor in his arguments to the jury; and in view of the failure by the court to correct the damage done by the prosecutor, error has been committed. Thus, the Defendant has been denied his rights as promulgated by the Supreme Court, in violation of the Michigan Statutes, the Michigan Constitution, and the Fifth Amendment to the United States Constitution.

The Court of Appeals, in discussing this crucial issue, devoted a single paragraph to same. In this paragraph, the Court of Appeals indicated that the Trial Judge instructed the jury properly on Defendant's failure to testify. It is Defendant-Appellant's argument herein. that the Trial Court did not sufficiently instruct the jury on this issue. A short perusal of the Court's instructions will indicate that no instruction whatsoever was given regarding the arguments of counsel, and that the jury was to disregard same as proof. Granted, an instruction on Defendant's failure to take the stand was given, but it is Defendant-Appellant's feeling that this instruction, standing alone, was not sufficient to negate the prejudice which was promulgated by the prosecution's remarks. It was the Court's duty in light of these comments, to instruct the jury that the arguments of counsel were not evidence and were to be disregarded as same. This, however, was not done by the trial court, and Defendant-Appellant raises this, in his application for leave to appeal, as sufficient prejudice for the reversal of his conviction.

IV.

In his Appeal to the Court of Appeals, Defendant-Appellant submitted for decision, the following issue

DID THE TRIAL COURT ERR IN REFUSING TO CHARGE THE JURY AS REQUESTED BY THE DEFENDANT'S COUNSEL, SETTING FORTH THE DEFENDANT'S THEORY OF THE CASE?

In support of this averment of error, Defendant-Appellant set forth the following argument in his Brief:

At the close of the Court's instructions to the jury, Defendant, by his counsel, objected to the theory propounded by the Court attributable to the prosecutor's case and the failure of the trial judge to similarly characterize the Defedant's theory of the case. It has been held that as against a mere general or abstract charge, a party is entitled to a specific instruction on his theory of the case, if there is evidence to support it. Even if a request for an instruction is not entirely perfect, it may, in some situations, impose upon the court the duty to give a more specific instruction on a particular issue, where it soundly appears that such an instruction is helpful to enable the jury to intelligently determine the question. It is the trial court's duty to see that the jury has a clear and intelligent understanding of what it is to decide, and failure to instruct with reasonable fullness, even in the absence of a request, is error. *Gardner v. Johnson, et al.*, 231 Iowa 1233, 3 N. W. 2d 606.

The Michigan courts have recognized the duty of the judge to instruct the jury under certain circumstances whether or not so requested, as is evidenced by the language found in 11 Michigan Appeals 219 and 8 Michigan Appeals 95.

M.C.L.A. §769.26 at page 761 contains the following language:

> "Where a defendant in a criminal case presents a theory supported by evidence, the court's attention is particularly directed to it. It is reversible error to refuse to give a charge on such a theory. *Marson v. U.S.* (C.A. 1953) 203 F. 2d 904. Claimed error in a trial court must, to be saved for review, must first be presented to the trial court, objections not raised during the trial and passed upon by trial court are not to be heard by reviewing court for the first time. *People v. Miller,* (1969) 16 Mich. Appeals 647."

Also in that case the Court of Appeals held that it may examine the record in a criminal case and search for error reflecting clear injustice notwithstanding the fact that no objection was made at trial. In this case, proper objection was made. Clearly the error which was committed by the trial court deprived the Defendant of his substantial rights and resulted in a miscarriage of justice.

The Court of Appeals, in its opinion on this case, on page 3, indicates that this failure to instruct was not a ground for setting aside the verdict unless the instruction was requested by Defendant.

It is evident from the trial transcript, that said instruction was indeed requested by the Defendant, but that the Trial Court refused to give same. Defendant-Appellant herein, avers that a showing of miscarriage of justice is indeed present in the failure to give this instruction, notwithstanding the fact that said instruction was not in writing and was not submitted at or before the close of evidence. The fact still remains, that this instruction was requested before jury deliberations commenced, and it was error for the trial court not to give same.

Furthermore, Defendant-Appellant disagrees that this error was properly before the Court for review. Objection was made on the record in the Trial Court, and this issue was raised based upon that objection, and therefore should have been thoroughly considered by the Court of Appeals. It is apparent that this was not done by the Court of Appeals, as is evidenced by the brevity of their opinion on this issue.

V.

As his final issue before the Court of Appeals, Defendant-Appellant averred the following:

WAS THE VERDICT OF THE JURY AGAINST AND CONTRARY TO THE GREAT WEIGHT OF THE EVIDENCE?

In support of this averment, Defendant submitted, in its brief, the following argument:

Review of the transcript in this proceeding, together with the Arguments heretofore promulgated by the Defendant, clearly indicates that nowhere during the prosecution's case were the People able to establish with any degree of clarity, either control, care, or custody in the defendant, of the child who the prosecution alleged said defendant punished. Indeed, nowhere throughout the course of the trial was there any testimony indicating that there was punishment of any sort, nor the extent of it, nor whether or not said punishment was justified. Clearly, such lack of evidence is contrary to statutory requirements which require proving certain elements as a condition precedent for finding the defendant guilty of the charged offense. To permit the verdict to stand in this case, permits the

prosecution to convict a defendant in the State of Michigan, using a "*res ipsa loquitur*" theory in a criminal case. It is interesting to note that our Supreme Court, even in Civil cases, will not permit the doctrine of *res ipsa loquitur* by name, and only permit a justifiable inference of negligence from circumstantial evidence.

Clearly, such permissive proofs in a civil case go contrary to the different burden of proof required by the prosecution in a criminal case; that being the burden of proving the Defendant guilty beyond a reasonable doubt. Unless we are prepared to convict defendants on a *res ipsa loquitur* type of theory, the criminal conviction in *People v. Jeffery Levy* should be vacated and the matter remanded for a new trial.

The Court of Appeals, in its opinion on page 4, devoted three lines to this particular issue. Defendant-Appellant can only say, at this stage of the proceedings, that the Court of Appeals utterly failed to address itself to this issue at all. It is immediately evident from a review of the trial transcript that the People in their burden of proof, and that the conviction of the Defendant was clearly against the great weight of the evidence and contrary to same. Defendant-Appellant requests this Court to consider this issue as the Court of Appeals obviously failed to do. It is Defendant-Appellant's hope that the Supreme Court of the State of Michigan will strike down a conviction based on little more than *res ipsa loquitur,* and reiterate its historical standing that the People must bear the burden of proof in a criminal prosecution, and that the Defendant must be proven guilty beyond a reasonable doubt.

CONCLUSION

Article I, Section 2 of the Michigan Constitution of 1963, states that:

> "No person shall be denied the equal protection of the laws."

Article I, Section 17 of the Michigan Constitution of 1963, states that:

> "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of Life, Liberty, or Property, without due process of law."

It is petitioner's position, based upon the foregoing, that he has been both denied the equal protection of the law, and has been deprived of his life and liberty, without due process of law, in contravention of the Constitution of the State of Michigan, as well as the Federal Constitution, and further, has been refused his appropriate relief by the appellate courts in this State. The Petitioner herein now takes his cause to this Appellate Court, to seek review for the reasons stated above.

Respectfully submitted:

LEMBERG, GAGE & BRUKOFF
/s/ Noel A. Gage
24361 Greenfield Rd.
Southfield, Michigan 48075
444-4848

APPENDIX "A"

ORDER FOR EXECUTION OF SENTENCE

State of Michigan
In the Circuit Court for the County of Oakland

No. CR 69-5133

People of the State of Michigan,
Plaintiff,
vs.
Jeffrey Scott Levy,
Defendant.

At a session of said Court, held in the Court House, in the City of Pontiac, County of Oakland, State of Michigan, on the 8th day of February, A.D. 1971.

Present: Honorable Clark J. Adams.

Whereas, the Defendant in this cause was sentenced to 1½ to 4 years at the State Prison for Southern Michigan at Jackson, on December 3, 1969, and

Whereas, the Defendant failed to appeal successfully to the Court of Appeals (see decision rendered December 2, 1970) and failed to gain leave to appeal in the Supreme Court (see order of January 22, 1971).

It is Hereby Ordered, that Defendant begin serving his sentence on January 27, 1971 (such date being the date Defendant surrendered himself to the Oakland County authorities.

Clark J. Adams
Circuit Judge

Approved as to form.

APPENDIX "B"

PEOPLE *v.* LEVY

1. CRIMINAL LAW—CRUELTY TO CHILDREN—EVIDENCE—PHOTOGRAPHS.

   Admission of photographs showing the extent of the bruises on a beaten child's body at defendant's trial for cruelty to children was not error even though there was no direct testimony that defendant beat the child where the photographs were graphic supporting evidence of medical testimony that the bruises resulted from a beating.

2. CRIMINAL LAW — SELF-INCRIMINATION — DEFENDANT TESTIFYING—PROSECUTOR'S COMMENT.

   Allowing prosecuting attorney to state, during closing argument, that the defendant had failed to prove by direct testimony what he said he would prove in his opening statement, was not reversible error, if error at all, as an indirect comment on defendant's failure to testify where the trial judge properly instructed the jury on the defendant's failure to take the stand.

3. CRIMINAL LAW—INSTRUCTIONS TO JURY—BASIC ISSUES—APPEAL AND ERROR.

   Failure to instruct the jury, except on a basic issue, is not a ground for setting aside a verdict unless the defendant requested the instruction not given (MCLA § 768.29).

Appeal from Oakland, Clark J. Adams, J. Submitted Division 2 November 13, 1970, at Lansing. (Docket No. 8,802.) Decided December 2, 1970. Leave to appeal denied January 22, 1971. 384 Mich 801.

Jeffrey Scott Levy was convicted of cruelty to children. Defendant appeals. Affirmed.

REFERENCES FOR POINTS IN HEADNOTES

[1] 29 Am Jur 2d, Evidence § 790.

[2] 53 Am Jur, Trial § 470 *et seq.*

[3] 53 Am Jur, Trial § 513 *et seq.*

Frank J. Kelley, Attorney General, Robert A. Derengoski, Solicitor General, Thomas G. Plunkett Prosecuting Attorney, and Frank R. Knox, Assistant Prosecuting Attorney, for the people.

Lemberg, Gage & Brukoff, for defendant.

Before: Quinn, P.J., and Danhof and Carroll,* JJ.

Quinn, P.J. Defendant was tried before a jury on a charge of cruelty to children,[1] and he was convicted and sentenced. His appeal raises five issues.

The child involved was the three-year-old son of Betty Louise Moseley, a twenty-year-old divorcee. Defendant was Mrs. Moseley's boyfriend, and he lived with her and the child at the time of the events leading up to this prosecution. During that same period, Mrs. Moseley worked nights as a waitress at Trainor's Tavern. May 16, 1969, when Mrs. Moseley went to work, she left her child with defendant. Later that night, the child was taken to the hospital with his body covered by bruises.

That same day, on the complaint of a police officer, a warrant issued for the arrest of defendant on the charge that "On or about May 13, 1969, defendant was then and there a person under whose protection a child, to wit: Charles B. Moseley, III, was and did cruelly or unlawfully punish said child". The information charged defendant in identical language. By amendment, the date of the offense charged in the information was changed to "On or about the thirteenth day of May to the sixteenth day of May".

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* Circuit judge, sitting on the Court of Appeals by assignment.

[1] MCLA § 750.136 (Stat Ann 1962 Rev § 28.331).

Defendant's first contention on appeal is that the time averment in the amended information is not sufficiently particular to inform him of the offense with which he was charged, and thus, he could not negate one element of the offense. In support of his position that the information must aver the time of the offense with particularity, defendant cites *People v. Loomis* (1910), 161 Mich 651, and *People v. Marks* (1931), 255 Mich 271. We find both cases to be inapposite; the information in *Loomis* charged a continuous offense extending over five and one-half months. The information in *Marks* charged three offenses in one count, two of which were of a continuous nature.

MCLA § 767.45 (Stat Ann 1954 Rev § 28.985) provides:

"The indictment or information shall contain:

"1. The nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged;

"2. The time of the offense as near as may be but no variance as to time shall be fatal unless time is of the essence of the offense".

MCLA § 767.51 (Stat Ann 1954 Rev § 28.991) provides:

"Except insofar as time is an element of the offense charged, any allegation of the time of the commission of the offense, whether stated absolutely or under a *videlicet,* shall be sufficient to sustain proof of the charge at any time before or after the date or dates alleged, prior to the finding of the indictment or the filing of the complaint and within the period of limitations provided by law: Provided, That the court may on motion require the prosecution to state the time or identify the occasion as nearly as the circumstances will permit, to enable the accused to meet the charge".

If defendant was dissatisfied with the time averment in the amended information, he should have sought relief in the trial court by motion as provided in MCLA § 767.51, *supra.*

Over objection, the trial court admitted four black-and-white photographs of the child in evidence. These photographs portrayed the extent of the bruises on the boy's body. There was no direct testimony that defendant punished this child. The photographs were graphic supporting evidence of the medical testimony that the bruises were the result of a beating. The admission of the photos was not error. *People v. Freeman* (1965), 1 Mich App 63.

In closing argument, the prosecuting attorney stated that defendant had failed to prove by direct testimony what he stated he would prove in his opening statement. Defendant claims this is error as an indirect comment on defendant's failure to testify. The trial judge instructed the jury properly on defendant's failure to testify. If this comment was error, it was not reversible error. *People v. Hider* (1968), 12 Mich App 526.

At the close of the trial court's instructions to the jury, defendant objected because his theory was not given. Defendant had submitted no requested instruction on his theory and he now claims reversible error because the trial court failed to so instruct.

Except on a basic issue, the failure to instruct is not ground for setting aside a verdict unless defendant requested the instruction that was not given. MCLA § 768.29 (Stat Ann 1954 Rev. § 28.1052). The requested instruction should be in writing and submitted at or before the close of evidence, GCR 1963, 516.1. Absent a showing of miscarriage of justice, the error asserted here is not the

basis for setting aside the verdict, MCLA § 769.26 (Stat Ann 1954 Rev § 28.1096), nor is this error properly before this Court for review. *Hunt v. Deming* (1965), 375 Mich 581. (Also see comments 2 Honigman & Hawkins, Michigan Court Rules Annotated (2d ed), p 567 and p 93 of the 1969 Cum Supp of the same volume.)

We have reviewed the trial court record and we are not persuaded that the verdict was against the great weight of the evidence.

Affirmed.

All concurred.

APPENDIX "C"

ORDER OF SUPREME COURT DENYING LEAVE TO APPEAL

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 22nd day of January in the year of our Lord one thousand nine hundred and seventy-one.

Present the Honorable Thomas M. Kavanagh, Chief Justice, Eugene F. Black, Paul L. Adams, Thomas E. Brennan, Thomas G. Kavanagh, John B. Swainson, G. Mennen Williams, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and the same is hereby Denied, for the reasons that defendant and appellant has failed to persuade the Court that he has a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 22nd day of January in the year of our Lord one thousand nine hundred and seventy-one.

/s/ Donald F. Winters

(Seal) Clerk.

SUPREME COURT ORDER DENYING MOTION FOR REHEARING

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 26th day of February in the year of our Lord one thousand nine hundred and seventy-one.

Present the Honorable Thomas M. Kavanagh, Chief Justice, Eugene F. Black, Paul L. Adams, Thomas E. Brennan, Thomas G. Kavanagh, John B. Swainson, G. Mennen Williams, Associate Justices.

On order of the Court, the "Motion for Rehearing on Application for Leave to Appeal" is treated as a motion for reconsideration of the order of this Court entered on January 22, 1971, denying defendant's and appellant's application for leave to appeal, and so considered, the same is Denied, for the reason that it does not appear that said order was erroneous.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this ..... day of ..... in the year of our Lord one thousand nine hundred and seventy-one.

/s/ Donald F. Winters

(Seal) Clerk.

APPENDIX "D"

MICHIGAN COMPILED LAWS ANNOTATED

767.51. *Same; allegation of time*

Sec. 51. Except insofar as time is an element of the offense charged, any allegation of the time of the commission of the offense, whether stated absolutely or under a *videlicet*, shall be sufficient to sustain proof of the charge at any time before or after the date or dates alleged, prior to the finding of the indictment or the filing of the complaint and within the period of limitations provided by law: Provided, That the court may on motion require the prosecution to state the time or identify the occasion as nearly as the circumstances will permit, to enable the accused to meet the charge.

750.136. *Cruelty to children; bond, suspension of sentence; search warrant*

Sec. 136. Any parent or guardian or person under whose protection any child may be, who cruelly or unlawfully punishes, or wilfully, unlawfully, or negligently deprives of necessary food, clothing or shelter, or who wilfully abandons a child under 16 years of age, or who habitually causes or permits the health of such child to be injured, his or her life endangered by exposure, want or other injury to his or her person, or causes or permits him or her to engage in any occupation that will be likely to endanger his or her health, or deprave his or her morals or who habitually permits him or her to frequent public places for the purpose of begging or receiving alms, or to frequent the company of or consort with reputed thieves or prostitutes, or by vicious training

depraves the morals of such child, shall, upon conviction, be deemed guilty of a felony: Provided, however, If, after such conviction and before sentence, in case the child has not been deformed or maimed, he or she shall appear before the clerk of the court in which said conviction shall have taken place, and with good and sufficient surety, to be approved by said clerk enter into bond to the people of the state of Michigan in the penal sum of $1,000.00 conditioned that he or she will furnish such child or children with necessary and proper home, care, food, shelter, protection and clothing, the said court may suspend sentence therein. When complaint is made on oath or affirmation to a magistrate or court having jurisdiction in such cases that the complainant believes that any of the provisions of law relating to or affecting children are being or about to be violated in any particular building or place, such magistrate or court being satisfied that there is a reasonable ground for such belief shall issue a warrant directed to the proper sheriff, constable, police officer or agent of such association, authorizing him to enter and search such building or place, and to arrest any person there present violating or attempting to violate any such law, and to bring such person before some court or magistrate of competent jurisdiction, together with the child or children concerning whom such offense has been committed, to be dealt with according to the law; and such attempt shall be held to be a violation of such law, and shall subject the person charged therewith if found guilty, to the penalties provided for such violation. As amended P.A. 1958, No. 97, § 1, Eff. Sept. 13.

769.26 *Error in pleading or procedure; effect*

Sec. 26. No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

MICHIGAN CONSTITUTIONAL PROVISIONS

(Article I)

Equal protection; discrimination.

Sec. 2. No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation.

Self-incrimination; due process of law; fair treatment at investigations.

Sec. 17. No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.